IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8898 of 1992

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SHAMJIBHAI L PATEL

Versus

DEPUTY COLLECTOR

Appearance:

MR BS SUPEHIA with MR JIVANLAL M PATEL for Petitioner

MR PUJARI AGP for Respondent No. 1 & 2

Respondent No. 3 served

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 24/11/2000

ORAL JUDGEMENT

Heard the learned advocates.

The petitioner challenges the order dated 30th April, 1991, made by the Mamlatdar, Dharampur, in Mamlatdar Court Case No. 5/89, and the order dated 14th August, 1992, made by the Deputy Collector, Valsad, in Revision Application No. 5/91. The dispute relates to a

right of way to the land bearing Survey No. 54 belonging to the petitioner herein. The respondent no.3 (hereinafter referred to as 'the applicant') is the owner of the land bearing Survey Nos. 52 and 53, situated at village-Mota Pondha, Taluka-Dharampur, to the East of the land bearing Survey No. 54 belonging to the petitioner herein. The applicant moved the Mamlatdar-Dharampur, and claimed that the applicant had a right of way through the land of the petitioner to Mota Pondha Ambheti road (hereinafter referred to as 'the main road'). However, on or about 17th June, 1988, the petitioner raised a fence over the said road blocking the applicant's passage to the main road. The said passage being the only passage for access to his field, he was unable to take his motor-car to or from the main road. The Mamlatdar, under the impugned order dated 30th April, 1991, directed the petitioner to remove the fence obstructing the alleged passage of the applicant towards the main road. Feeling aggrieved, the petitioner preferred Revision Application No. 5/91 before the Deputy Collector, Valsad. The Deputy Collector, Valsad, under his order dated 14th August, 1992, dismissed the said Revision Application.

Mr.Supehia has produced copies of the application made by the applicant, written statement filed by the petitioner, the statement given by the petitioner and one Vashanjibhai Fakirbhai, the certificate dated 8th June, 1988, issued by the Talati-cum-Mantri of Mota Pondha, and the map produced before the authorities below.

On perusal of the map, it appears that the main road and the canal pass through the land Survey No. 54 belonging to the petitioner. Towards the East of the said road and the canal and beyond the boundary of the land Survey No. 54 are situated the lands bearing Survey Nos. 52 and 53 belonging to the applicant. Towards the North of the said land is a 15 Ft. wide road which passes over the canal and opens on the main road. The disputed piece of land over which the applicant has claimed a right of passage is the Northern end of the land bearing Survey No.54. Even in the application, the applicant has claimed that there was a fence near 15 Ft. wide road for a long time. It has also come on the record that part of the land Survey No. 54 has been encroached upon by the applicant and an eviction decree has been passed against him which is still a subject matter of litigation. Considering the statement made in the application, the written statement and the oral evidence and the statement given before the Mamlatdar and

the location of the land, it does appear that that the applicant had an access to the main road through 15 Ft. wide road beyond the Northern boundary of the land Survey No. 54. However, with a view to having a straight access to the main road directly from the land he has encroached upon, he has claimed a right of passage through the land Survey No. 54 near its Northern boundary. Thus, in my view, the authorities below are not right in holding that the applicant had a right of passage through the land Survey No. 54 as claimed by him, more particularly, in the application he has admitted that a fence was pre-existing for several years. The applicant could not have lodged a claim of right of passage through the land of the petitioner just for the benefit of a short-cut to the main road. The claim made by the applicant, therefore, was not justiciable and was required to be rejected.

Mr. Supehia has submitted that in any view of the matter, what the applicant claimed was a right of passage to pass his motor-car and such a claim could not have been entertained by the Mamlatdar since the Mamlatdar's court has no jurisdiction to entertain such dispute. I am afraid this contention is not acceptable. Section 5 of the Mamlatdar's Court Act, 1956, (hereinafter referred to as 'the Act') empowers the Mamlatdar's court, interalia, to remove or cause to be removed any impediment, erected otherwise than under due authority of law, to disturb or obstruct any person in possession of any land or premises used for agricultural or grazing or in the use of roads or customary ways thereto. Mr. Supehia has submitted that this power can be exercised only in case where the claim is for an approach to the agricultural land. However, in this case, the applicant has claimed right of passage to carry his vehicle to the main road. The argument does not hold water. It is indisputable that the land Survey Nos. 52 and 53 which belong to the applicant are being used for agricultural purposes. The power vested under section 5 of the Act can not be construed to mean that it refers to an access from one field to another and that for an individual person only but not to an access from the road and for vehicle also. If a person has a right of passage, the right can be exercised by the person individually or to carry his vehicle which for the farmer may be a bullock-cart also. Same is the view expressed by the Division Bench in the matter of KANBI DEVJI VALJI VS KANBI SHAMJI SHIVJI (1977 GLR 309). Considering section 5 (2) of the Act read with section 19 (4) of the Act, the court has held that the Mamlatdar acting under section 5 of the Act has power to restore the use of the

road or customary way by ordering removal of an obstruction caused to the use thereof which may amount to total deprivation of the use of the road or customary way. The contention as regards the jurisdiction of the Mamlatdar raised by Mr. Supehia is, therefore, rejected.

However, since on perusal of the record, I have already held that the passage in question was not a customary passage and the applicant had another access to the main road, the orders of the authorities below directing the petitioner to remove the fence and to open the passage for the benefit of the applicant are not sustainable.

In view of the above discussion, the petition is allowed. The impugned orders dated 30th April, 1991, made by the Mamlatdar, Dharampur, in Mamlatdar Court Case No. 5/89 and dated 14th August, 1992, made by the Deputy Collector, Valsad, in Revision Application No. 5/91, are quashed and set aside. The Mamlatdar Court Case No. 5/89, registered on the files of the Mamlatdar, Dharampur, stands dismissed. Rule is made absolute. There shall be no order as to costs.

(MS R.M.DOSHIT J)

JOSHI